Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION,
Intervenor/Appellant,

v.

UNITED STATES OF AMERICA,
and
WESTERN ELECTRIC COMPANY, INC.,
AND AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

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MOTION OF INTERVENOR/APPELLEE TANDY CORPORATION TO DISMISS OR AFFIRM

MALCOLM R. PFUNDER,
Counsel of Record
JANET E. PITTERLE
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
Counsel for Intervenor/Appellee

December 22, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

As stated in the Jurisdictional Statement of Intervenor/appellant North American Telephone Association (NATA), the question presented by its appeal is as follows:

Did the District Court correctly construe and apply the Antitrust Procedures and Penalties Act in reaching the conclusion that a settlement agreement precluding Bell Operating Company participation as suppliers of unregulated CPE, although within the reaches of the public interest, ought not to be entered because the Court's conception of the remedy that would maximize competitive conditions in CPE markets differed from the Department of Justice's view of the remedy that would maximize competitive conditions?

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WESTERN ELECTRIC COMPANY, INC.,
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Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION OF INTERVENOR/APPELLEE TANDY CORPORATION TO DISMISS OR AFFIRM

Intervenor/appellant North American Telephone Association has appealed from a final judgment of the United States District Court for the District of Columbia approving a consent decree proposed by the United States Department of Justice and defendants American Telephone and Telegraph Company (AT&T) et al.[1] Pur-

[1] In addition to the parties listed in the caption of the case in this Court, the District Court granted intervenor status to numerous parties, which are listed in the District Court's Order of August 26, 1982, reproduced in the Joint Appendix at pp. 191-94. *See* note 3, *infra*.

suant to Rule 10.5 of the Supreme Court Rules, Intervenor/appellee Tandy Corporation[2] respectfully moves this Court to dismiss NATA's appeal as moot or, alternatively, to affirm the portion of the District Court's judgment permitting the Bell Operating Companies (BOC's) to market customer premises equipment (CPE).

OPINIONS BELOW

The opinion of the District Court, issued on August 11, 1982, is reported at 34 Fed.R.Serv.2d 991 (D.D.C. 1982) and is reproduced in the Joint Appendix (hereinafter cited as J.A.)[3], pp. 1-172. The District Court's order modifying the Final Judgment originally entered on January 24, 1956, was filed on August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,900 (D.D.C.) and is reproduced in the Joint Appendix, pp. 173-190. The District Court's Memorandum opinion dated August 23, 1982, denying the Government's request for reconsideration of the portion of its opinion of August 11, 1982, relating to customer premises equipment marketing is reported at 1982-2 Trade Cas. ¶ 64,980 (D.D.C.) and is reproduced in the Joint Appendix, pp. 195-200.

The District Court's order granting intervenor status, entered on August 26, 1982, is not reported but is repro-

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[2] Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal from the United States District Court for the District of Columbia, filed with this Court on November 17, 1982 (No. A-449).

[3] Both Tandy Corporation and NATA joined with several states and state public service commissions in submitting a Joint Appendix to their individual jurisdictional statements, which is separately bound and is incorporated by reference herein.

duced in the Joint Appendix, pp. 191-194. The District Court's order entered on November 10, 1982, certifying this case for direct appeal pursuant to the Expediting Act is not reported but is reproduced in the Joint Appendix, pp. 204-08.

JURISDICTION

NATA has appealed from a final judgment entered in the United States District Court for the District of Columbia approving a consent decree that modifies the 1956 Final Judgment in the *Western Electric* case[4] and settles an action brought by the Government in 1974 in the District Court for the District of Columbia under Section 2 of the Sherman Act, 15 U.S.C. § 2. The District Court's opinion was issued on August 11, 1982. (J.A. at 1). The Order modifying the 1956 Final Judgment in the *Western Electric* case was filed on August 24, 1982. (J.A. at 173). Tandy Corporation was granted intervenor status by the District Court's Order of August 26, 1982 (J.A. at 191). On November 10, 1982, the District Court entered an Order certifying a direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29(b). (J.A. at 204). Federal jurisdiction is based upon 28 U.S.C. § 1337, and the jurisdiction of this Court is invoked under 15 U.S.C. § 29(b).

STATUTES INVOLVED

The statutory provisions involved are identified in NATA's Jurisdictional Statement at p.3 and set out verbatim at J.A., pp. 242-47.

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[4] *United States* v. *Western Electric Co.*, 1956 Trade Cas. ¶ 68,246 (D.N.J.).

COUNTERSTATEMENT OF THE CASE

On January 24, 1956, the District Court for the District of New Jersey approved a proposed consent decree between AT&T and the Department of Justice, putting an end to a case that had begun in 1949 with the filing of a complaint by the Government against AT&T and its subsidiary the Western Electric Company, Inc. *United States* v. *Western Electric Co.*, Civil Action No. 17-49.[5] That complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies, in violation of Sections 1, 2 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 2 and 3. Among the provisions of the 1956 consent decree was a prohibition on AT&T's engaging in any business other than the provision of common carrier communications services.

On November 20, 1974, the Department of Justice filed another antitrust suit against AT&T, Western Electric and Bell Telephone Laboratories, Inc., alleging monopolization of telecommunications services and equipment in violation of Section 2 of the Sherman Act. *United States* v. *American Telephone and Telegraph Co. et al.*, Civil Action No. 74-1698 (D.D.C.) (the *AT&T* case). Trial began in January, 1981. Following conclusion of the Government's case, the Court denied defendants' motion to dismiss the action. *United States* v. *American Telephone and Telegraph Co.*, 524 F.Supp. 1336 (D.D.C. 1981). On January 8, 1982, with the defendants having presented virtually their entire case, the parties advised

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[5] The *Western Electric* case was assigned a new docket number (C.A. No. 82-0192) when it was subsequently transferred to the District Court for the District of Columbia.

the Court they had reached agreement on a proposed decree.

Rather than "settling" the *AT&T* case, which they had been litigating since 1974, the parties sought a dismissal of that case and simultaneously filed a "Modification of Final Judgment" with the District Court for the District of New Jersey, which was to replace the *Western Electric* decree with an entirely new decree. On January 11, 1982, the District Court for the District of New Jersey approved the proposed Modification. Subsequently, on motion of the parties, the New Jersey Court transferred the *Western Electric* action to the Court hearing the *AT&T* case, and the latter vacated the January 11 Order approving the proposed Modification. By agreement of the parties, the District Court ordered that procedures equivalent to those required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the Tunney Act), be applied to the proposed settlement.[6]

The proposed settlement required the divestiture of the twenty-two BOC's from AT&T and limited the BOC's to providing local telephone exchange service. The divested BOC's were not permitted under that proposal to manufacture or market telecommunications products or CPE, or to provide interexchange services, directory advertising such as the Yellow Pages, information services, or any other product or service which is not a "natural monopoly service actually regulated by tariff."

In furtherance of its review of the proposed decree, the Court solicited comments from interested persons. Over 600 comments were received. In its Comments, Tandy

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[6] The parties initially took the position that the Tunney Act did not apply to modifications of existing decrees.

urged, *inter alia*, that the BOC's should be permitted to sell, but not manufacture, CPE. *Comments of Tandy Corporation* (filed April 20, 1982).

Following review of the comments submitted by Tandy and other interested parties, and responses from AT&T and the Department of Justice, the Court on May 25, 1982, specified a number of issues for further briefing. Among the issues it raised were the absence of restrictions on AT&T, and the restrictions proposed for the divested BOC's. Tandy filed briefs addressing most of the issues it had discussed in its Comments, once again urging, *inter alia*, that the BOC's be permitted to sell, but not manufacture, CPE.

On June 17, 1982, the Court scheduled oral argument on the issues specified in the Court's May 25 Order. Counsel for Tandy was designated one of the lead counsel on the issue regarding "Restrictions on Bell Operating Companies." At that hearing, held June 29, 1982, Counsel for Tandy reiterated the arguments regarding the CPE issue Tandy had previously raised in its filings. (Oral Argument Transcript at 25169-25178).

In its August 11, 1982, opinion the Court determined that the prohibition on CPE marketing was not in the public interest and indicated it would not approve the decree unless AT&T and the Justice Department would agree to several specified changes, one of which would permit the divested BOC's to provide, but not manufacture, CPE. (Slip op. at 112, J.A. at 109). The Court also indicated that it would grant intervenor status to those who previously had filed requests or motions to intervene. (Slip op. at 164, J.A. at 159).

On August 23, 1982, the Court denied the Government's request that it reconsider its position regarding the BOCs' participation in the CPE market. (J.A. at 195).

The parties then submitted a proposed decree incorporating the Court's required changes and on August 24, 1982, the Court entered the amended Modification of Final Judgment, vacated the provisions of the 1956 consent decree (J.A. at 173) and ordered the *AT&T* case dismissed. On August 26, 1982, it granted intervenor status to numerous parties, including Tandy Corporation.[7] Several intervenors filed timely Notices of Appeal in the U.S. District Court for the District of Columbia. On November 10, 1982, in response to motions filed by the United States and three intervenors pursuant to the Expediting Act, 15 U.S.C. § 29(b), the District Court certified that the "immediate consideration of the appeals taken herein by the Supreme Court is of general public importance in the administration of justice." (J.A. at 207).

REASONS FOR DISMISSING THE APPEAL OR, IN THE ALTERNATIVE, AFFIRMING THE JUDGMENT BELOW

I. The Question Presented By NATA For Review Is Moot.

NATA has requested Supreme Court review of the question whether the District Court had the power under the Tunney Act, 15 U.S.C. § 16(b)-(h), to require the parties to modify their proposed consent decree as a condition of the Court's entry of that decree. Because the parties agreed to the modification required by the District Court, that question is moot. *See Coastal Petroleum Co.* v. *Secretary of the Army*, 547 F.2d 288, 289 (5th Cir. 1977) (After parties reached a settlement which was en-

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[7] Intervenors were granted limited rights, including the right to appeal from the Court's approval of the proposed settlement and the right (to the extent permitted by the reviewing courts) to support the decisions of the Court in any appeal taken by another intervenor. *See* J.A. at 193-94.

tered by the District Court, Court of Appeals declined to decide a pending issue which had previously been certified by District Court); *Samoff* v. *International Association of Machinists District Lodge No. 1*, 420 F.2d 952, 953 (3d Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (Appeal by charging parties who objected to stipulation entered into by union with NLRB dismissed as moot).

This Court has no power to issue advisory opinions;[8] it "may act only in the context of a justiciable case or controversy." *Securities and Exchange Commission* v. *Medical Committee For Human Rights*, 404 U.S. 403, 407 (1972); *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969). "To be cognizable in a federal court, a suit . . . must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (citations omitted). Thus, in the absence of a real controversy, the question presented becomes moot and this Court lacks jurisdiction "to decide moot questions or abstract propositions." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246, *quoting United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

The specific modification to which NATA objects relates to the marketing of CPE by the divested BOC's. The consent decree negotiated between the Government and AT&T and presented to the District Court contained a provision that would have precluded the BOC's from providing CPE following their divestiture. The District Court found that such a prohibition was not in the public interest and required that the parties modify the proposed decree to eliminate it. (Slip op. at 112, J.A. at 109).

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[8] *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

Although the Justice Department disagreed with Judge Greene's conclusion, it acquiesced in the required modification, as did AT&T.[9] The proposed consent decree was modified in accordance with Judge Greene's requirements and resubmitted to the District Court, which promptly approved it. Since both parties agreed to the modification of their proposed consent decree and the District Court approved the modified decree in the form submitted by the parties, the question of the District Court's power to require the modification is no longer at issue.

II. The District Court Judge Had The Authority To Require Modification Of The Proposed Consent Decree.

NATA argues that "the Antitrust Procedures and Penalties Act does not accord to the judiciary either the duty or the privilege of supplanting the reasonable judgments of the Department of Justice." (Jurisdictional Statement at 10).[10] If by that is meant that the District Court lacks the power, *over the objections of the Department of Justice*, to modify a consent decree proposed by

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[9] In light of the Government's acquiescense, its "continued dedication to the originally proposed settlement terms" (NATA Jurisdictional Statement at 6 n.7) is, of course, irrelevant.

[10] NATA attempts to skirt a difficult threshold issue (i.e., determining the "reasonableness" of the Justice Department's judgment) by asserting that the originally proposed consent decree was at least "within the reaches of the public interest" (Jurisdictional Statement at i). Indeed, NATA erroneously states that the District Court so found. (Jurisdictional Statement at 8, citing J.A. at 32-33). There does not appear to be any support for NATA's assumption that the originally proposed decree was "within the reaches of the public interest" on this issue. The District Court in fact explicitly concluded that the prohibition on BOC marketing of CPE was *not* in the public interest. (Slip op. at 112, J.A. at 109).

the Department, that issue is not before the Court on this appeal. If instead NATA is suggesting that the District Court lacked the authority to disagree with the Justice Department's interpretation and application of the Tunney Act's public interest standard,[11] that position is not legally supportable.

In fact, just the opposite is true. As the District Court pointed out, "[i]t is clear that Congress wanted the courts to act as an independent check upon the terms of decrees negotiated by the Department of Justice." *See* slip op. at 27 & n.75 and cases cited therein, J.A. at 28. A principal aim of the Tunney Act was to review the Justice Department's judgment in agreeing to a proposed antitrust consent decree, rather than to give such decrees "rubber stamp" approval, as NATA's approach implies. H.R. Rep. No. 1463, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6535, 6538-39. "The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface." *United States* v. *Gillette Co.*, 406 F.Supp. 713, 715 (D.Mass. 1975); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737, 739 (D.Vt. 1981). Instead, one of the central purposes of the Tunney Act was to require "case by case judicial scrutiny" of proposed consent decrees. H.R. Rep. No. 1463, *supra*, 1974 U.S. Code Cong. & Ad. News at 6543.

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[11] The Tunney Act requires the trial court to determine whether a proposed consent decree is in the public interest before the consent judgment can be entered. 15 U.S.C. § 16(e); *United States* v. *Bechtel Corp.*, 648 F.2d 660, 665 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737, 739 (D.Vt. 1981); *United States* v. *Carrols Development Corp.*, 454 F.Supp. 1215, 1222 (N.D.N.Y. 1978).

The District Court's authority to review the terms of a proposed consent decree—and the extent of its discretion in the exercise of that authority—are well established. H.R. Rep. No. 1463, *supra*, 1974 U.S. Code Cong. & Ad. News at 6538-39, quoting S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973); and *see International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 251-52 (1959). The Court may not defer to the judgment of the Justice Department if that judgment is not consistent with the public interest. The trial court is free to reject the settlement proposed by the Justice Department,[12] or to condition approval of the consent decree upon acquiescence of the parties to specified changes. *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 40 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) (District Court entered proposed consent decree only after Government and defendant agreed to certain substantive modifications of order); *United States* v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301, 1310 (W.D.Pa. 1970) (Court conditioned approval of proposed decree on addition of safeguards to employee benefit and pension funds).

NATA appears to suggest that "when the government's determination of appropriate terms for the settlement of antitrust litigation is neither tainted by improper influence nor flawed with false logic" (Jurisdictional Statement at 10), then the settlement proposed by the Government is by definition consistent with the public interest and must be approved by the District Court. Again, however, there is no support for NATA's reading of the Tunney Act. Judge Greene explicitly rejected such

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[12] *United States* v. *Automobile Manufacturers Association, Inc.*, 307 F.Supp. 617, 620-21 (C.D. Cal. 1969), *aff'd*, 397 U.S. 248 (1970).

a reading for three reasons—the magnitude of the impact of the proposed decree upon the entire telecommunications industry and related interests, the Court's intimate familiarity with the industry and with AT&T's alleged antitrust violations by reason of the lengthy trial proceedings prior to the settlement, and legitimate questions concerning prior exercise of the Justice Department's judgment in connection with proposed consent decrees in the 1949 and 1974 suits against AT&T. (Slip op. at 31-36, J.A. at 31-36). NATA simply ignores this reasoning, seeking neither to challenge nor to refute it.

Instead, NATA offers only this conclusory assertion:

> Judge Greene . . . assigned too much credit to the short run value of offsetting AT&T's dominant position in CPE markets with the countervailing competitive strength of the BOCs as a supplement to existing competition in those markets.

(Jurisdictional Statement at 7). While one may either agree or disagree (as Tandy does) with NATA's value judgment, NATA does not explain its relevance to the question of Judge Greene's legal authority to require modification of the originally proposed consent decree.

The District Court correctly stated the purpose of the Tunney Act (slip op. at 25-27, J.A. at 25-28) and explained why unquestioning deference to the proposal submitted by the parties would be inconsistent with the Tunney Act's public interest requirement. (Slip op. at 31-36, J.A. at 31-36). Thus, there simply is no basis for NATA's narrow interpretation of the Tunney Act's public interest standard and thus no reason for more extensive briefing or oral argument on this issue.

III. The District Court's Reasons For Requiring Modification Of The Proposed Consent Decree Are Unchallenged.

The thrust of NATA's argument goes only to the legality of the District Court's rejection of the "reasonable" judgment of the Justice Department in framing the terms of the proposed settlement, rather than to the District Court's reasons for requiring modification of those terms. The District Court's own opinions provide sound and fully adequate justification for the required modification, and NATA challenges that justification—if at all—only by implication.

The District Court's requirement of a modification in the proposed consent decree to permit BOC marketing of CPE rested on two related conclusions. First, the Court in effect determined that the prohibition on BOC marketing of CPE was unnecessarily anticompetitive. The District Court found the proposed restriction on BOC marketing of CPE "directly anticompetitive." (Slip op. at 102, J.A. at 99). Even the Department of Justice conceded that "restrictions on entry are generally anticompetitive and deserve the most careful scrutiny." (Department of Justice Response to Comments, May 20, 1982, at 56). The District Court believed that restriction to be unnecessary because it found the likelihood of anticompetitive conduct by the BOC's in the marketing of CPE to be low. (Slip op. at 110-11, 174, J.A. at 106-08, 168-69; Memorandum opinion of August 23, 1982, at 2-5, J.A. at 196-99). Not only are these factual conclusions of the District Court entitled to substantial deference;[13] but nowhere in its jurisdictional statement does NATA seek to challenge them.

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[13] *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974); *International Boxing Club of New York, Inc.* v. *United States, supra*, 358 U.S. at 251.

The other basis for the District Court's action was its determination that the procompetitive impact of BOC entry into CPE marketing was essential to satisfy the public interest standard of the Tunney Act. The Court found that the BOC's would make a "very substantial contribution . . . to vigorous competition in the customer premises equipment market." (Slip op. at 111, J.A. at 108). It also concluded that:

> When that remote risk [of anticompetitive conduct by the BOC's] is balanced against the certainty that the Operating Companies would be a strong counterweight to the domination of the customer premises market by AT&T, the Court can only conclude that the restriction proposed by the government is not justified.

(Memorandum opinion of August 23, 1982, at 3; J.A. at 197). NATA does not challenge these findings, or their underlying rationale. Instead, it relies simply on its own unsupported suggestion that Judge Greene gave too much weight to the procompetitive impact of BOC entry and too little to the dangers of possible anticompetitive conduct by the BOC's.

NATA thus supplies no compelling reason supporting the need for plenary consideration of its appeal.

IV. BOC Entry Into CPE Marketing Is An Essential Component Of A Consent Decree Satisfying The Public Interest Standard.

The consent decree settling the Government's antitrust action against AT&T will have an enormous impact upon the telecommunications industry. The District Court found that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications re-

> search, and the production and marketing of equipment. . . . In addition, the Bell System as presently constituted has few powerful competitors in any of the activities in which it is engaged.

(Slip op. at 101, J.A. at 98). The Government suit was brought to attack this Bell System monopoly. In order to satisfy the Tunney Act's public interest standard, the consent decree settling that suit must provide an effective remedy that undermines, and ultimately dissipates, the monopoly power of AT&T which the suit itself challenged. (Slip op. at 29-30 and cases cited therein, J.A. at 30). The decree, if properly framed, would accomplish that essential goal by introducing effective competition into the markets that have historically been dominated by AT&T.

It is particularly important that the proposed decree assure an effective remedy for AT&T's domination of the CPE market. Under the decree approved by the District Court, AT&T will nevertheless be by far the largest nationwide retailer of CPE after divestiture of the BOC's. There presently is no other competing retail distribution system with the accumulated goodwill, market position and marketing resources that remotely approach those of AT&T in the CPE market. Independent manufacturers and marketers of CPE simply cannot by themselves provide effective competition with AT&T, which could thus continue to dominate CPE marketing in this country for the foreseeable future.

The BOC's are the only potential entrants into CPE marketing that have the ability to inject effective competition that could challenge AT&T's dominance. Obviously, their historic ties with the Bell System, their retention of the Bell trade name and marketing logo, and their existing customer relationships with telephone us-

ers will give them substantial advantages in CPE marketing unavailable to any other potential entrant or present competitor of AT&T. Permitting the BOC's to enter the CPE market is thus an essential prerequisite to creation of meaningful competition where none has previously existed.

The District Court correctly considered these advantages and opportunities. It also recognized the possibility of BOC abuse of their position. Weighing carefully the Government's warnings about the possible incentives for such abuse, the Court nevertheless dismissed as remote the likelihood of any anticompetitive conduct by the BOC's. The District Court was in an excellent position to assess the Government's arguments; it ultimately found them unconvincing on the facts presented. Those issues having received full consideration by the District Court, there is neither occasion nor compelling reason for additional detailed review by the Supreme Court.

Tandy Corporation thus respectfully urges the Supreme Court to affirm summarily the decision of the District Court to permit BOC entry into CPE marketing.

CONCLUSION

For the foregoing reasons, Intervenor/appellee Tandy Corporation respectfully moves that this appeal be dismissed as moot or, alternatively, that the portion of the judgment of the District Court for the District of Columbia permitting the BOC's to market CPE equipment be affirmed.

Respectfully submitted,

MALCOLM R. PFUNDER,
Counsel of Record
JANET E. PITTERLE
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
Counsel for Intervenor/Appellee Tandy Corporation